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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

The Steamship BUENA VENTURA, JUAN DE LUZARRAGA, Claimant-Appellant, AGAINST THE UNITED STATES, Libelant-Appellee.	No. 106. (Prize.)

BRIEF FOR THE BUENA VENTURA.

Statement.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, entered May 27, 1898, under which the steamship *Buena Ventura* was condemned as lawful prize of war (Rec., p. 9). The grounds of the condemnation, as stated in the final decree, were:

"That the said steamship *Buena Ventura* was enemy's property; and was upon the high seas, and not in any port or place of the United States upon the outbreak of the war, and was liable to condemnation and seizure" (p. 9).

The proofs upon which the condemnation was rested consisted of the answers given by Juan de Luzarraga, the master, and Silvestre Asteinza, the mate of the *Buena Ventura*, to the standing interrogatories, and of the documents seized on board the ship by the captors. By stipulation between the Government and the claimant (Rec., p. 32), certain of these documents, certified here from the Court below, are printed as part of the record on appeal (Rec., pp. 32–39).

From this evidence, it appeared that the *Buena Ventura* was a Spanish merchant vessel, owned by the firm of Larrinaga & Company, which, for a number of years, has had a commercial domicile in England. Some of the members of this firm resided in Liverpool, and others in Spain, but all were Spanish subjects. She was engaged exclusively in the carriage of cargoes, and at the time of her capture on April 22, 1898, was making a voyage under a charter-party which had been concluded in Liverpool March 23, 1898 (Rec., pp. 38–39).

This contract recited that the vessel was "now ready to leave Cuba," and provided that she should proceed thence with all convenient speed to Ship Island, Miss., and there load a cargo for Rotterdam. She had so proceeded, and had arrived at Ship Island on or before the 31st of March, and between that date and the 13th of April, had taken on board a cargo of lumber in accordance with the contract.

The charter gave the vessel liberty to stop at any port or ports on the voyage for coal and/or cargo (*clause* 2), and at the time of her capture she was bound for Norfolk, Virginia, to take in bunker coals. She had left Ship Island on the 19th of April, and sailed on a straight course from about eighteen miles off the lighthouse at Chandeleur, La., to Tortugas, and about 7.30 o'clock on the morning of the 22d of April was proceeding along close to the Florida Reefs, when she was captured, about eight or nine miles from Sand Key Light, near Key West, by the gunboat *Nashville*, and brought into the port of Key West as a prize. The shot that stopped her was the first that was fired in the war.

The steamer made no resistance at the time of her capture (Ans. 3rd Int., p. 18; Ans. 29th Int., p. 20). There were no military or naval officers or other passengers on board of her (Ans. 26th Int., pp. 20, 23), and she carried no arms or munitions of war (Ans. 31st Int., pp. 20, 23).

The vessel was libeled in the District Court for the Southern District of Florida, on the 23d of April, 1898. The libel alleged that the *Buena Ventura* had been captured by the United States ship of war *Nashville*, on the 22d of April, on the high seas, as prize of war; that the vessel and her cargo had been brought into port at the

harbor of Key West, and State of Florida, within the jurisdiction of the Court, and that both were lawful prize of war, and subject to be condemned and forfeited to the United States as such (Rec., p. 1).

Process under the libel was executed on the same day by reading it to the master of the vessel, and posting two copies in public places at Key West, and also by publication (Rec., p. 3). This process cited and admonished "all persons whomsoever having any right, title, claim or interest in or to the said steamer *Buena Ventura*, to appear at an admiralty session of said Court to be held in the Court Rooms of said Court, at Key West, in said District, on Monday, the 9th of May, A. D. 1898, at 10.30 o'clock in the forenoon of that day, to show cause, if any they have, why prize money should not be decreed according to the prayer of the libelant, and to attend upon every session of said Court from that time held until a final decree shall be rendered in the premises" (Rec., p. 3).

The time for the presentation of claims having been extended, the master of the vessel, Juan de Luzarraga, intervening as bailee for the interest of the owners, filed a claim to the vessel on May 18, 1898, denying that she was lawful prize, and praying that she should be restored, with damages and costs (p. 6).

On the same day he filed a test affidavit (pp. 7 and 8), in which the circumstances of the voyage and of the capture were set forth, and the suggestion was made that the vessel was exempt from capture and condemnation by the terms of a Proclamation issued by the President on April 26, 1898, and by the general prize law, as administered in the United States.

The circumstances which led up to this capture appear in certain acts of the Congress and of the Executive Departments of the Government, to which it will be convenient here to refer.

On April 20, 1898, the Congress passed, and the President approved, the following joint resolution:

"(No. 24.) Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and govern-

ment in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

"Whereas the abhorent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

"FIRST.—That the people of the Island of Cuba are, and of right ought to be, free and independent.

"SECOND.—That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"THIRD.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

"FOURTH.—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

"Approved April 20, 1898" (30 *Stat. at Large* Pt. II., p. 738).

Upon this resolution being communicated to the Spanish Minister in Washington, he immediately demanded his passports in the following letter:

"WASHINGTON, April 20.

"Mr. SECRETARY:

"The resolution adopted by the Congress of the United States of America and approved to-day by the President is of such a nature that my permanence in Washington becomes impossible, and obliges me to request of you the delivery of my passports. The protection of the Spanish interests will be intrusted to the French Ambassador and to the Austro-Hungarian Minister. On this occasion, very painful to me, I have the honor to renew to you the assurances of my highest consideration.

"LOUIS POLO Y BERNABÉ."

"To HON. JOHN SHERMAN,
Secretary, &c.

(*Foreign Relations*, 1898).

On the same day, the Secretary of State sent the Spanish Minister his passport, in the following words:

"UNITED STATES OF AMERICA, DEPARTMENT OF STATE.

"*To all to Whom These Presents Shall Come.*

"GREETING: Know ye that the bearer hereof, Senor Don Louis Polo y Bernabe, Envoy Extraordinary and Minister Plenipotentiary of Spain to the United States, is about to travel abroad, accompanied by his family and suite. These are therefore to request all officers of the United States, or any State thereof, to permit him to pass freely, without let or molestation, and to extend to him all friendly aid and protection in case of need.

"In testimony whereof, I, John Sherman, Secretary of State of the United States of America, have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington this twentieth day of April, A. D. 1898, and of the independence of the United States of America the one hundred and twenty-second.

[SEAL.] "JOHN SHERMAN."

On April 20, 1898, the text of the above resolution of Congress, passed on that day, was cabled to the United States Minister at Madrid, together with the following despatch:

"To WOODFORD, Minister, Madrid:

"You have been furnished with the text of a joint resolution voted by the Congress of the United States on the 19th inst., approved to day, in relation to the pacification of the island of Cuba. In obedience to that act the Presi-

dent directs you to immediately communicate to the Government of Spain said resolution, with the formal demand of the Government of the United States that the Government of Spain at once relinquish its authority and government in the island of Cuba and Cuban waters. In taking this step, the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people, under such free and independent government as they may establish.

"If by the hour of noon on Saturday next, the 23d of April, instant, there be not communicated to this Government by that of Spain a full and satisfactory response to this demand and resolution whereby the ends of peace in Cuba shall be assured, the President will proceed without further notice to use the power and authority enjoined and conferred upon him by the said joint resolution to such extent as may be necessary to carry the same into effect.

"SHERMAN."

(*Foreign Relations*, 1898).

The reply of the Minister at Madrid was received on April 21, 1898, and was as follows:

"SHERMAN, Washington:

"Early this (Thursday) morning, immediately after the receipt of your open telegram, and before I had communicated same to Spain, the Spanish Minister of Foreign Affairs notified me that the diplomatic relations are broken between the two countries, and that all official communications between their respective representatives have ceased. I accordingly asked for safe passports. Turn legation over to British Embassy and leave for Paris this afternoon. Have notified Consuls.

"WOODFORD."

(*Foreign Relations*, 1898).

The letter from the Spanish Minister of Foreign Affairs, to which reference is made in the foregoing telegram, was in these words:

"MADRID, April 21, 1898.

"Hon. STEWART L. WOODFORD,

"Minister of the United States of America.

"Dear Sir: In compliance with a painful duty I have the honor to inform Your Excellency that the President

having approved a resolution of both Chambers of the United States, which in denying the legitimate sovereignty of Spain and threatening an immediate armed intervention in Cuba, is equivalent to an evident declaration of war, the Government of His Majesty has ordered its Minister in Washington to withdraw without loss of time from the North American territory, with all the *personnel* of the Legation.

"By this act the diplomatic relations which previously existed between the two countries are broken off, all official communications between their respective representatives ceasing, and I hasten to communicate this to Your Excellency in order that on your part you may make such dispositions as seem suitable.

"I beg Your Excellency to acknowledge the receipt of this note at such time as you deem proper, and I avail myself of this opportunity to reiterate to you the assurances of my distinguished consideration.

"P. GULLON."

(*Foreign Relations*, 1898).

On this date instructions were given by the Secretary of the Navy to the Commander-in-Chief of the North Atlantic squadron to blockade certain ports in Cuba:

"WASHINGTON, April 21, 1898.

"SIR,—The Department's instructions of April 6 are modified as follows: You will immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west; also, if in your opinion your force warrants, the port of Cienfuegos, on the south side of the island. It is considered doubtful if the present force at your command would warrant a more extensive blockade.

"It should be borne in mind that whenever the Army is ready to embark for Cuba the Navy will be required to furnish the necessary convoy for its transports. For this reason it does not seem desirable that you should undertake at present to blockade any more of the island than has been indicated. It is believed that this blockade will cut off Havana almost entirely from receiving supplies from the outside.

"The Navy Department is considering the question of occupying the port of Matanzas by a military force large enough to hold it and to open communications with the insurgents, and this may be done at an early date, even before the main party of the Army is ready to embark. If this operation is decided upon, you are directed to co-

operate with the Army and assist with such vessels as are necessary to cover and protect such a movement.

"If you obtain any information of the movements of Spanish ships of war in any part of the West Indies, you will, if practicable, inform the Department by telegraph of such movements.

"In conducting such other operations as you may deem desirable, you will be governed by the instructions contained in the Department's letter of April 6.

"The Department does not wish the defenses of Havana to be bombarded or attacked by your squadron.

"Very respectfully,

JOHN D. LONG,
Secretary.

"Commander in Chief,
"U. S. Naval Force, North Atlantic Station."

(*Appendix to the report of the Chief of the Bureau of Navigation*, 1898, p. 175.)

On April 22d the President publicly proclaimed this blockade:

"*By the President of the United States:*

A PROCLAMATION.

"Whereas, by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the government of Spain, it was demanded that said government at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and the President of the United States was directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several States to such an extent as might be necessary to carry said resolution into effect; and

"Whereas, in carrying into effect said resolution, the President of the United States deems it necessary to set on foot and maintain a blockade of the north coast of Cuba, including all the ports on said coast between Cardenas and Bahia Honda, and the port of Cienfuegos, on the south coast of Cuba:

"Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted and will maintain a blockade of the north coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos, on the south coast of Cuba, aforesaid, in pursuance of the laws of the United States and the law

of nations applicable to such cases. An efficient force will be posted, so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of said ports or attempting to leave the same without notice or knowledge of the establishment of such blockade will be duly warned by the commander of the blockading forces, who will indorse on her register the fact and the date of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable.

"Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the City of Washington this 22d day of April, A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

"WILLIAM MCKINLEY.

"By the President.

"JOHN SHERMAN,

"Secretary of State."

The blockade was instituted on April 22d. (*Appendix to Report of the Chief of the Bureau of Navigation*, 1898, pp. 167–8).

On April 23d the Spanish Royal decree was issued, in which it was said:

"ART. I. The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 27th October, 1795, the Protocol of the 12th January, 1877, and all other agreements, compacts and conventions in force *up to the present* between the two countries" (*Gaceta de Madrid*, 24 Apl., 1898; *London Gazette*, May 3, 1898).

On April 25th, the President addressed a message to the Congress, with which he transmitted "for its consideration and appropriate action" the foregoing correspondence, and a notification that he had declared the blockade of certain Cuban ports, adding:

"In view of the measures so taken, and with a view to

the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your Honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon, to the end that the definition of the international status of the United States as a belligerent power may be made known and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured" (*Messages and Papers of the Presidents*, Vol. 10, p. 154).

On the same day the Congress passed, and the President approved the following:

"AN ACT DECLARING THAT WAR EXISTS BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF SPAIN.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST.—That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898."

(30 *Stat. at Large, Pt.* 2, *Ch.* 189.)

On April 26th, 1898, the President issued the proclamation of war referred to in the claim and test affidavit herein, which was in these terms:

[No. 8.]

"*By the President of the United States of America:*

"A PROCLAMATION.

"WHEREAS, by an act of Congress, approved April 25, it is declared that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; ar

"WHEREAS, it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris:

"Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

"3. Blockades in order to be binding must be effective.

"4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; *provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

"In witness whereof I have hereto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington, on the twenty-sixth day of April, in the year of our Lord
[SEAL.] one thousand eight hundred and ninety-eight, and of the independence of the United States the one hundred and twenty-second.

"WILLIAM MCKINLEY.

"By the President.

"ALVEY A. ADEE,

"Acting Secretary of State."

(30 *Statutes at Large*, p. 1770.)

On the day this proclamation was issued (April 26th) the *Buena Ventura* was in the port of Key West, and she was not within the class of vessels excluded from the privilege and immunity granted by the fourth section (Ansrs. to 26th and 31st Ints., pp. 20, 23).

The case was heard below by the Hon. James W. Locke, District Judge, in the latter part of May, 1898, and was decided in an oral opinion, delivered May 27th, which also disposed of the cases of the *Panama*, *Catalina*, *Miguel Jover*, *Pedro* and *Guido*, and their cargoes (Rec., p. 9). The opinion of the Judge was subsequently reduced to writing, and was filed July 13, (pp. 24-32).

The vessel was sold under the final decree entered on

May 27th (p. 9), and her proceeds were deposited to abide the event of this appeal. The cargo was released.

The claimant, Juan de Luzarraga, duly appealed to this Court, from that part of the decree which condemned the ship, and assigned the following errors (pp. 10 and 11):

"1st. For that the Court held and decided that the *Buena Ventura* was lawful prize of war.

"2d. For that the Court omitted and refused to hold that the *Buena Ventura* was not lawful prize of war.

"3d. For that the Court omitted and refused to find that the *Buena Ventura* was privileged and exempt from capture and condemnation as prize under and by virtue of the President's proclamation issued April 26, 1898.

"4th. For that the Court omitted and refused to hold that the *Buena Ventura* was privileged and exempt from capture and condemnation under the fifth article of the President's proclamation, by reason of the fact that she was bound to a port or place in the United States and had sailed on her then voyage from a foreign port prior to April 21, 1898.

"5th. For that the Court omitted and refused to find that the *Buena Ventura* was exempt from capture and condemnation by reason of the fact that her cargo had been taken on board and she had departed therewith from a port of the United States prior to May 21, 1898.

"6th. For that the Court omitted and refused to hold that the vessel was privileged and exempt from condemnation by reason of the fact that she was in a port or place of the United States on April 26, 1898, and was not within the classes of vessels excepted from the privileges accorded by the fourth article of the proclamation.

"7th. For that the Court omitted and refused to find that the *Buena Ventura* was in a place within the United States on April 21st and April 22d, at the time of her capture, and hence was privileged and exempt from capture and condemnation under the fourth article of the President's proclamation."

POINTS.

I.

The Buena Ventura was exempt from condemnation by the terms of the fifth section of the President's proclamation of April 26, 1898.

The parts of the proclamation material to this point are as follows:

"Whereas, it being desirable that such war should be conducted upon principles in harmony with the present views of nations as sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering but to adhere to the rules of the Declaration of Paris;

"Now, therefore, I, WILLIAM M'KINLEY, President of the United States of America, by virtue of the power vested in me by the constitution and laws, do hereby declare and proclaim. * * *

"(5) Any Spanish merchant vessel which prior to April 21st, 1898, shall have sailed from any foreign port bound for any port or place in the United States shall be permitted to enter such port and to discharge her cargo and afterward forthwith to depart without molestation; and any such vessel if met at sea, by any United States ship, shall be permitted to continue her voyage to any port not blockaded" (30 *Stat.*, p. 1770; *ante* p. 10).

(**1**.) It is contended by the appellant that the *Buena Ventura* had sailed from a foreign port prior to April 21, 1898, on the voyage during which she was captured, and that at the time of her capture, she was bound for a port or place in the United States within the meaning of this provision of the proclamation.

These facts appear from the evidence of the witnesses and from the captured papers.

(**a**.) Her charter-party provided for such a voyage.

In answer to the fifteenth standing interrogatory, the master testified (p. 17):

"The ship, at the time she was seized, was under a charter signed for the voyage. I gave it up with the other papers to the capturing ship."

This charter party (following p. 38) contained these provisions:

"LIVERPOOL, 23rd March, 1898.

"It is this day mutually agreed between Messrs. Larrinaga & Co. (owners) of the good steamship called *Buena Ventura*, under the Spanish flag, of 1,151 tons net register measurement, or thereabouts, and classed.....now ready to leave Cuba, and W. S. Keyser & Co., merchants of Pensacola, Fla., &c. * * *

"That the said vessel shall with all convenient speed sail and proceed to Ship Island, or as near thereto as she may safely get, and (being in hull, machinery, tackle and apparel, tight, staunch and strong, and in every way fitted for the voyage) there load (always afloat) from the said merchants, their agents or assigns, as necessary, a full and complete cargo, to consist of deals and /or boards, at merchant's option, which said merchants bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin, crew and fuel spaces, tackle, apparel, provisions and furniture, and being so loaded, proceed therewith as customary, to Rotterdam, as ordered, on signing bills of lading, or as near thereto as she can safely get, and there deliver her cargo at such wharf, dock or place as consignees of cargo may direct, on arrival, always afloat, in accordance with bills of lading. * * * The vessel to have liberty to sail with or without pilots, and to tow and assist vessels in all situations; also *to call at any port or ports for coal and /or other supplies.*"

Then follow certain exceptions upon the ship's liability; provisions relative to the amount and payment of the freight, signature of bills of lading, advances of cash for the ship's disbursements at the port of loading, lay days, demurrage, the delivery of the cargo alongside; and a provision that "should the vessel not be in all respects

ready for cargo at her loading place, on or before the 10th of April, charterers or their agents have the option of canceling this charter."

The steamer entered upon the performance of this charter party by sailing from Cuba to her looding port, the United States, in ballast (*Luzzaraga*, Ansrs. 8th and 15th Ints., pp. 18, 19).

The date of her arrival is not stated; but it appears that her cargo, consisting of about 800,000 feet of lumber, was laden at Ship Island from March 31st to April 13, 1898 (*Id.*, Ans. 22d Int., p. 19). She probably reached Ship Island about March 30th.

She was cleared from the Custom House at Scranton, in the port of Pascagoula, Mississippi, April 14th (*Id.*, Ans. 7th Int., p. 18; *Receipt for Duties and Fees*, p. 33); but did not sail for Norfolk until April 19th (Ans. 7th Int., pp. 18, 22), owing to low tides (p. 7).

(**b**.) The evidence of the witnesses shows that she was bound to Norfolk.

Though the ultimate destination of the ship and cargo was Rotterdam (*Ans. to 12th Int., p.* 19), she was not bound there when captured. The witnesses several times repeated in their depositions that the steamer was immediately bound to Norfolk (*Luzarraga, Ans. to 29th Int., p.* 19; *Antienza, Ans. to 7th and 29th Ints., pp.* 22, 23). This also appears from the ship's documents.

(**c**) On April 14th, she obtained from the Collector of Pascagoula, a clean bill of health (p. 36), in which it was stated that "the Spanish S. S. *Buena Ventura* of Bilbao, of which J. de Luzarraga is master, is now ready to depart from the port of Ship Island, Mississippi, for Norfolk, Va., and other places beyond the sea * * * "

(**d**.) The manifest (p. 38) showed that she was bound for Norfolk. It is entitled: "*Coasting Manifest.* Manifest of the cargo on board of the Span. S. S. *Buena Ventura*, of the burden of 1,332 tons, whereof J. de Luzarraga is master, bound from Pascagoula, Miss., to Norfolk, Va." After a description of the cargo, the manifest continues:

"*Permit to proceed coastwise to lade for a foreign port,*"

"United States Customs Service, Port of Pascagoula.

"J. de Luzarraga, master of the Span. S.S. *Buena Ventura*, of Bilbao, having sworn as the law directs, that there are not laden on board the said vessel any articles or cargo whatever other than sea stores and the cargo specified upon the manifest now exhibited, *permission is hereby granted to the said vessel to proceed from this port to Norfolk, in the district of Norfolk, and State of Virginia, to lade bunker coal.* Any merchandise laden on the vessel at this port for export in her will be included in the export returns to the Treasury Department from this office.

"Given under my hand at the Custom House this 14th day of April, 1898.

"Fees, $2 for foreign vessel.

"A. E. KREBS,
"Deputy Collector."

(**e**.) The ship's clearance (p. 39) was for Norfolk, and is in the following terms:

"District of Pearl River, Port of Pascagoula, 14th day of April, 1898.

"J. de Luzarraga, having sworn as the law directs, to the within manifest, consisting of lumber and ship's stores, articles of entry, and delivered a duplicate thereof, *permission is hereby granted to the said S.S. Buena Ventura to proceed to Norfolk, Va., to lade bunker coal.*

"Given under our hands at the Custom House Pascagoula, the day and year above mentioned.

"Coasting manifest No. 1 and clearance paper.

"A. E. KREBS,
"Depy. Coll."

(**f**.) The first three bills of lading covering the cargo shipped by William S. Keyser & Co., were dated in Pascagoula, 13th April, 1898, and recited that the vessel was bound for Rotterdam, Holland, where the cargo was to be delivered "unto order of shippers or their assigns, he or they paying freight for the said timber and deals, *and all other conditions as per charter*-party dated Liverpool, 23d March, 1898."

The remaining three bills of lading issued at the same place and on the same day, covered the cargo shipped by Price & Pierce and Hunter, Benn & Co. These contained the same recitals as to destination, and provided for delivery there unto order of Messrs. Price & Pierce or their assigns "they paying freight for the said goods, *with all other conditions as per charter-party*" (*Rec.* following p. 32).

The charter contained a liberty to call at any port or ports for coals (*Clause* 2); and it is usual for vessels taking cargoes from Gulf ports to Europe to stop at Norfolk for this purpose (*Hostetter* v. *Park*, 137 U. S., 39). It was contemplated from the outset that Norfolk should be a port under the charter-party.

The ship's papers show, then, (1) that she was making the voyage under and in performance of the charter-party, and (2) that she was on that stage of the voyage which was to end at Norfolk.

(**g.**) It seems clear, as a matter of law, that the chartered voyage began when she sailed for Ship Island to load.

The charter-party, dated March 23d, provided that the vessel,

"*Now ready to leave Cuba * * * shall with all convenient speed sail and proceed to Ship Island.*"

During that stage of the voyage, the ship was in ballast; but from the moment she sailed from Cuba towards Ship Island, her service and the voyage under the charter-party began. This has been decided in a number of cases. An action on the contract would have been maintainable if she had not proceeded as provided by the charter-party (*Waterbury* v. *Street*, 3 U. S. App., 310). And if the ship had been detained in Havana by an epidemic, or by restraints of rulers, or had been delayed during the transit by dangers of navigation, the exceptions in the charter-party would have been available to the owner by way of defense to a suit for failing to proceed to Ship Island with all convenient speed.

The exceptions come into operation as soon as the

voyage under the charter is begun, and the voyage is begun under this form of contract when the ship sails under it towards her port of loading (*Waterbury* v. *Street*, 3 U. S. App., 147; *Bruce* v. *Nicolopulo*, 11 Exch., 129; *Barker* v. *McAndrew*, 11 C. B. n.s., 758; *Valente* v. *Gibbs*, 6 C. B. n.s., 268, 286).

It seems clear that this should be regarded as a part of a continuous voyage under the rule laid down in previous decisions of this Court (The *Joseph*, 8 Cranch, 451; The *Peterhoff*, 5 Wall., 28; The *Springbok*, 5 Wall., 1; The *Circassian*, 2 Wall., 130; The *Bermuda*, 3 Wall., 551).

It appears, then, that the ship, having sailed from Cuba before the 21st of April, 1898, upon a continuous voyage, in the ordinary course of which she was bound first to Ship Island and afterwards to Norfolk, was within the first clause of the 5th section of the proclamation, as a Spanish merchant vessel, which prior to April 21, 1898, had left a foreign port bound for a port or place in the United States.

The privileges and immunities granted to such a vessel are that she

"Shall be permitted to enter such port and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

It must be conceded that the *Buena Ventura* did not *discharge* her cargo at Ship Island and forthwith depart; but that, on the contrary, she *loaded* a cargo and afterwards departed, without molestation, with all her proper papers and with an express Governmental permission to proceed to Norfolk (p. 39). This immaterial variation from the exact terms of the proclamation should not deprive the ship of its benefits, because it was then lawful for her to do what she did.

But it was the view of the District Judge, and, doubtless, will be urged by the captors here, that this section of the

proclamation applies only to vessels which, having sailed from a foreign port before April 21st, had arrived, or were in such position at the time of capture that they would have arrived, in a port of the United States after that date. This, however, is not the language of the proclamation.

Even assuming that it should be so read, the vessel may still be considered as within this section, because at the time of her capture she was still upon the voyage which had begun in a foreign port before April 21st, and was bound for Norfolk, a port or place in the United States.

It is immaterial that Norfolk was not her ultimate destination; she satisfied the two essential conditions of having sailed upon this voyage from a foreign port before April 21st, and being immediately bound to a port in this country.

Under the documents she carried Norfolk was a necessary port of call. There, in the usual course, she would have obtained her foreign clearance, her foreign bill of health, and a supply of bunker coals, of which only 58 American tons had been taken at Ship Island (*See Log, Apl. 19th*). That was also the place for her to file her foreign manifest (*Treas. Circular*, No. 84, June 5, 1896: *post*, p. 44).

Under any fair construction of the proclamation, she was, we submit, bound for a port within the United States when captured.

(**h.**) The reasons which led the District Judge to condemn the vessel are stated in his opinion as follows (p. 31):

"In the case of the *Buena Ventura* it is shown by the evidence that she cleared from Scranton, Miss., with permission to touch at Newport News for coal on her voyage to Rotterdam. Although she was to touch there for that purpose, it was not a port of discharge, nor was she from a foreign port, and her case clearly does not come within the language of the proclamation. Had she been captured approaching Newport News for the purpose of coaling, even then there might have been some opportunity for argument that the permission to touch had given her encouragement, and it should in justice furnish the same

protection as to a vessel coming from a foreign port; but that was not the case. When captured she must have been pursuing the same course she would have pursued had there been no intention to stop for coal; and neither such intention nor permission tended in any way to increase the liability of her capture. She was an enemy's vessel found upon the high seas at the commencement of the war, and not coming within the exceptions of the proclamation."

It will be seen from this passage of his opinion that the District Judge left completely out of view, the fact that the ship was making a voyage under a charter-party, the performance of which had been entered upon at Havana prior to April twenty-first.

He also states inaccurately the terms of the clearance. This was not from "Scranton, Miss., with permission to touch at Newport News for coal on her voyage to Rotterdam." There is no mention of Newport News or of Rotterdam in the clearance, which in terms says: "Permission is hereby granted to S. S. *Buena Ventura* to proceed to Norfolk, Va., to lade bunker coal" (p. 39). Nothing whatever is said in it as to her ultimate destination, or the voyage beyond Norfolk.

It is stated in the test affidavit, and was not disputed, that "in the ordinary course of such a voyage the *Foreign* Clearance of the vessel for Rotterdam would have been obtained and issued from the Custom House in Norfolk" (p. 7). This is confirmed by a reference to the Treasury Circular No. 84 of June 5, 1896 (*post* p. 44).

The District Judge further says that Norfolk was not a port of discharge. It is submitted, however, that this is immaterial. If a vessel was entitled to discharge at a port in the United States, and forthwith to depart without molestation, it would surely be her privilege to depart from such a port without discharging.

A further reason given for excluding her from the proclamation was that she was not from a foreign port. This raises the question of the construction of the charter-party, and the voyage the steamer was performing under it, which has been previously referred to, but which the Judge failed to discuss or consider.

The Court below appears to have been of the opinion that if she had been captured on "approaching Newport News for the purpose of coaling," instead of near Key West, her case would have been better, as the permission to proceed to Norfolk could be said to have given her encouragement, and should in justice furnish the same protection as to a vessel coming from a foreign port. But the Judge adds: "That was not the case" (p. 31).

Of course it was not *the* case, but was it a *different* case? The proofs show, incontestably, that, when captured, she was navigating by the landmarks of our coast, on the usual course of vessels bound from Gulf ports to Newport News. She had steered a comparatively straight course from a point 18 miles off the lighthouse at Chandeleur, S. 47° E., from the 19th to the 20th, and S. 42° 30′ E. from the 20th to the 21st, which is the last registered course in the Log prior to her capture. These courses, laid down on the chart filed herewith, show she went in a southeasterly direction during the whole of that time, and that unless the last stated course was changed she must have passed within the range of the light on Tortugas. From that point to the place of capture she was, as the captain states, "steering *near the coast* along the Florida Reef, bound for Norfolk for coal" (*Ans. to 29th Int., p.* 20).

Both the master and mate testified that the ship's course was at all times directed toward Norfolk, and that she was not at any time sailing beyond or wide of her place of destination (*Ans. to 29th Int., pp.* 20, 23). There is no reasonable doubt upon the whole evidence that she was going to Norfolk.

An inference contrary to a clearly proved fact should not be indulged by a prize court. Ordinarily the burden of proof is on the captors (*The Resolution*, 2 Dall., 12), and unless further proofs are ordered, the case must be rested upon the evidence of the witnesses examined on the standing interrogatories and upon the documents captured with the ship. A fact which is fairly established by such evidence must be taken by the Court, as fully demonstrated (*per Dr. Lushington, in the Aline & Fanny*, Spinks' Pr. Cas., *at p.* 329; *The Dos Hermanos*, 2 Wheaton, 76).

This being the undoubted rule of practice, it is not believed that the remark of the Court below that "she must have been pursuing the same course she would have pursued had there been no intention to stop for coal," was intended to imply any doubt on that point.

If the ship had not been intending to go to Norfolk under the permission granted by the collector at Pascagoula, but was designing to escape possible dangers of capture by proceeding direct to Rotterdam, it is probable that she would either have skirted the Cuban coast instead of our own, or would have passed to the south of Cuba through the Yucatan Passage. As she had not been at any stage of her voyage on a course leading in either of those directions, it is evident that, in the Judge's words, "the permission to touch *had* given her encouragement"; that she was steaming in supposed security to Norfolk; and that the permission under which she was so proceeding "should" (as the Judge says) "in justice furnish the same protection as [that afforded by the proclamation] to a vessel coming from a foreign port."

(i.) The case of the *Buena Ventura* appears to fall distinctly within the ruling made in the *Argo* (Spinks' Pr. Cas., p. 52), which arose under the Queen's proclamation of 1854 (App. B, *post*). Under that proclamation, "any Russian merchant vessel which prior to the date of this order" (March 29th) "shall have sailed from any foreign port bound for any port or place in Her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation"; and that "any such vessel, if met at sea by any of Her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

The *Argo* was a Russian vessel, bound on a voyage from Cuba "to Cork *for orders*." "For orders" evidently meant directions as to the port at which the cargo was to be discharged. The voyage was made under a charter-party, pursuant to which the vessel had sailed in ballast from Havana to Matanzas, leaving

the former port prior to March 29th, had taken on her cargo at Matanzas, and sailed from there for Cork *after* March 29th. And the question was, whether she had sailed from a foreign port for a port in England before March 20th, within the meaning of the proclamation. Dr. Lushington said (p. 52):

"This is a Russian vessel, captured on May 6. She left Cuba on April 2, with a cargo belonging to Kirkland & Co., Glasgow. She reached Queenstown May 6, and was there seized by a revenue cutter. The cargo was restored, and a claim is now made for the ship and freight. The ship, being enemy's property, must be condemned, unless she is protected by some act of the British Government, and it is alleged that she is so protected by the Order in Council of March 29.

"With regard to the construction of that order, I have already stated in a former case the principles which will guide my judgment (The *Phœnix*, Spinks' Pr. Cas., p. 5), and to which I intend to adhere till better informed by a higher tribunal.

"I am of opinion that all relaxation of belligerant rights, eminating from the government of this country, and declared in authentic documents, should receive a liberal construction, as liberal a construction as the terms of those documents will admit of; but, in so doing, I must be governed and restricted by the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument here construed.

"First, then, what are the facts of the case? In the month of February this vessel was lying in the port of Havannah, whence she had come from the port of Antwerp with a cargo landed at Havannah; whilst at Havannah she took in ballast, then sailed for Matanzas, and there shipped her cargo. Matanzas was the last clearing port, and she left it on April 2d. According to the evidence of the master, on the 9th Interrogatory, the cargo was begun to be put on board on February 28th, and completed on March 30th.

"This vessel sailed under a charter-party bearing date February the 7th at the Havannah, and by the charter-

party it was stipulated that the vessel should load at Havana *and or* Matanzas; forty-two running days are to be allowed; at the end of which demurrage was to be paid. Should the vessel be ordered to Matanzas, sufficient cargo or ballast should be given at Havana to keep her safe.

"I must here observe that the contract, beyond all doubt, was made at the Havannah, and, as I understand it, the charterers had the option to load at the Havannah, or at Matanzas, or partly at one, or partly at the other; and not only was the contract entered into at the Havannah, but it began to be executed there, first, by taking in the ballast, as mentioned in the charter-party, and, secondly, by the running of the lay days, as appears by the indorsement of the charter party itself." * * *

"The next branch of this Order directs that any Russian merchant vessel which, prior to this Order, shall have sailed from any foreign port bound for any port or place in the Queen's dominions shall be permitted to enter and depart without molestation. This vessel did sail from the Havannah prior to the date of the order; she sailed from Matanzas subsequently to the date of the Order. When she left the Havannah she was in ballast, bound for Cork, according to the charter-party.

"It has been contended that this Order in Council contemplated that the Russian vessel should have been laden at the date of the Order, but I find no words in the Order that would justify my putting so strict a construction upon it; neither do I think that there are any words which impose the necessity of not touching at, or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

"The real meaning of the Order in Council, according to my view of it, is that the vessel shall have sailed prior to the 29th of March on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement of which was at the Havannah,

and that the sailing from the Havannah prior to March 29th is a substantial compliance with the terms of the Order. I must, therefore, restore this vessel."

(**2**.) In determining the right of the *Buena Ventura* to exemption from condemnation under this paragraph of the proclamation, the Court should adopt the most benevolent construction of it that is consistent with its language, with its objects, and with the fair principles under which the President announced the war would be conducted.

(**a**.) The preamble of the proclamation stated it was desirable that the war "should be conducted upon principles in harmony with the present views of nations as sanctioned by their recent practice."

The form of the proclamation was adopted with slight variation from an Order in Council issued by the Queen upon the outbreak of the Crimean War in 1854 (*Appendix* B, *post*, p. 56, *Spinks' Prize Cases*, App., p. III.). The Fifth Article and the passage in the Queen's proclamation dealing with the question under discussion are subjoined:

President's Proclamation.

WHEREAS, it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris:

Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Consti-

Queen's Proclamation.

The Queen's most Excellent Majesty in Council

Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that * * *

Any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place

tution and the laws, do hereby declare and proclaim:

5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

The proclamations issued by Napoleon III and by the Czar were similar in effect but different in form (*Appendix* C, *post*, p. 57; *Appendix* D, *post*, p. 58).

All of the proclamations were alike in this, that they exempted from capture vessels which were bound to ports in the countries granting the immunity, upon voyages which had begun prior to the outbreak of war. A similar principle was adopted in the Franco-Prussian War (*Owen's Declaration of War*, p. 54).

The King's instructions of July 23, 1803, directed restitution of ships and cargoes (caught in trade with the enemy) *bona fide* belonging to British subjects; "sailing, before the knowledge of hostilities, from the Colonies of France and Holland, to whatever country they might be going" (The *Onderneeming*, 56 Rob., 7; *note*).

It is most significant that, though many prizes were taken in these different wars, not a single instance has been referred to where a ship which had sailed for a port in the captor's country before the outbreak of war, was seized and condemned as prize (*Owen*, pp. 59, 60). Unless such cases are found, it would seem plain that cap-

tures like the present are not based "On principles in harmony with the modern views of nations as sanctioned by recent practice."

A "practice" is not necessarily a custom in the sense in which customs are referred to in municipal law. What has been done by other powers in recent wars is a recent "practice" within the sense of the preamble; and a practice may be negative as well as positive.

It was formerly the practice to seize the persons of enemies on land and detain them as prisoners of war; to confiscate their property and debts due to them, even when contracted in piece. As a matter of strict right, some, if not all, of these things may still be done; but the recent "practice" is not to do any of them (1 *Halleck Int. Law*, by Baker, pp. 530-539).

In *Laurence's Principles of International Law*, 406, it is stated that:

"At the beginning of the Crimean War in 1854 a period of six weeks was granted by both sides, and in the case of the Russian White Sea ports the days of grace were made to date from the opening of the navigation at the break-up of the ice, and not from the commencement of hostile operations. Moreover, trading vessels on their way to enemy ports when the war began were allow to enter and depart unmolested within the specified time."

This would apply as well to vessels bound coastwise in the captor's country as to vessels bound from enemy ports.

In *Owen's Declaration of War* (London, 1889, pp. 54, 55), the recent practices of nations are thus stated:

"On the outbreak of hostilities the right of capture at once becomes active, but having regard to the example in moderation set by the belligerent powers in recent wars, it is not unreasonable to suppose that the right to capture any enemy vessels within the dominions on the outbreak of hostilities will henceforth be postponed. Thus, in the war with Russia in 1854, six weeks was allowed for Russian merchant vessels within British territory to load and proceed; whilst such vessels which had sailed for British

ports prior to the outbreak were permitted to enter, discharge and proceed unmolested to any port not blockaded. And on the occurrence of the Franco-German war in 1870, thirty days were allowed for German merchant vessels in French ports to load or unload and depart, whilst those vessels which had sailed prior to the war with cargoes on French account were also to be free from capture (60 *British State Papers*, 879). To French vessels in German ports a period of six weeks was allowed in which the vessels might load or unload and depart (60 *British State Papers*, 899)."

(**b.**) The construction of the language of the proclamation, moreover, should be liberal in favor of the captured ships.

This was held in a number of cases arising under the Queen's proclamation in 1854, and is the rule announced by the text writers.

In The *Phœnix*, Spinks' Prize Cases, p. 5, Dr. Lushington announced the rule for the construction of the Queen's proclamation, above referred to, in these terms:

" Much of the argument in the present case has turned upon that document which bears date the 29th of March last, and which immediately succeeds an order in council for preventing vessels clearing out for Russia, and ordering, as is customary in all wars, a general embargo or stoppage of enemies' vessels. Now upon what principle am I to put a construction upon this document? I am perfectly free to confess that I think it to be quite clear that whenever the Government of Great Britain or of any other country, by a public document in the nature of an order in council, *relaxes the severity of belligerent rights*, it ought to be taken *in favor of the party for whom it is intended, and that a liberal construction should be put upon it*. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord Stowell. However, it is perfectly clear that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they

express it. The principle being to put upon the words *the most extensive interpretation which is consistent with them*t I take it for granted there must be words in the documen, sufficient to justify that interpretation. I am not at liberty to travel out of the document. *If the words of the document are capable of two constructions, then I am clearly of the opinion that the one most favorable to the belligerent party in whose favor the document is issued ought to be adopted;* but the Court must bear in mind that its province is not *jus dare,* but *jus dicere;* and I must again refer to the principle which I have often enunciated in this Court: *verbis plane expressis omnino standum est.*"

The same learned Judge in The *Argo* (Spinks' Prize Cases, p.52), said:

"I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive a liberal construction—as liberal a construction as the terms of those documents will admit of."

Construing the proclamation in the light of the evils intended to be avoided and of the practices intended to be followed, it seems obvious that a vessel which has left one of our own ports prior to April 21st and is bound coastwise for a ther port ought to have the same protection as a vess which had sailed directly from a foreign port on the sam ate for a port in the United States. If there be any difference between the cases, the reasons for granting exemption from capture and condemnation are greater in the former case than in the latter, since the perils are greater, and a semblance of complete security is afforded by the granting of the coastwise clearance. The *Buena Ventura*, if not strictly within the language, was, nevertheless, within the plainest implications of the proclamation, and should, therefore, be entitled to its protection.

(**c**.) The Proclamation should be construed with due regard to our traditional policy towards the question of the exemption of private property at sea from capture during war.

From the administration of President Munroe, down to the present time, the Executive Department of the Government has consistently and persistently maintained, and has urged upon other Governments, the principle that private property at sea, as on land, should be exempt from capture during war. The messages and correspondence on this subject are collated in 3 *Wharton's International Law Digest*, Section 342.

These views have also been embodied in the treaties with Bolivia in 1858 (*Treaties and conventions between the United States and other Powers*, pp. 90, 93, Art. IX.), and with Italy in 1871. Article XII. of the latter is as follows:

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military force of either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party" (*Treaties and Conventions between the United States and other Powers*, pp. 581, 584).

The refusal of the United States to subscribe to the Declaration of Paris in 1856 was based in part on the failure of the other Governments to follow our lead upon this point (2 *Halleck's Int. Law* [*Baker's Ed.*], p. 41). Mr. Marcy, writing to Mr. Seibels July 14, 856, said:

"The objections by the Government of the United States to the declaration of the Paris conference of 1856 are that (1), 'All the four propositions must be taken or none'; (2) they limit the future sovereign power of the parties concerned; (3) they exact the surrender of privateering, a surrender the United States cannot make; (4) they do not exempt private property of non-belligerents from confiscation" (3 *Wharton's Int. Law Dig.*, Sec. 342, p. 268)

Successive Presidents and Secretaries of State have emphasized the desirability of the general adoption of this principle, from the earliest times down to the present day; and President McKinley, whose proclamation of

April 26th declared that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, is himself an advanced advocate of the doctrine. In his second annual message to the Senate and the House of Representatives, dated December 5, 1898, after the conclusion of the war with Spain, his views on this point were expressed in these words:

"We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceable trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers" (*Messages and Papers of the Presidents*, Vol. 10, pp. 191, 192).

It is believed that the delegates appointed by the President to the recent Peace Conference at the Hague were instructed to and did endeavor to obtain the assent of that Conference to the general adoption of these principles.

This attitude of the Government towards private property at sea in time of war, so long maintained and adopted by the present Executive, should lead the Court to regard the proclamation as a benevolent design to afford immunity from capture to all vessels over which its protection, by the most liberal interpretation, can be extended.

II.

The Buena Ventura was exempt from condemnation by the fourth article of the proclamation.

The proclamation was issued on April 26, 1898, and on that day it appears from the record that the *Buena Ventura* was in Key West, in custody of the United States Marshal, under the process issued pursuant to this libel.

The fourth section of the proclamation, which, for comparison, may be shown in parallel with the similar provision of the Queen's Proclamation of March 29, 1854, is as follows:

President's Proclamation	*Queen's Proclamation.*
4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ships, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.	Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May, next, six weeks from date hereof, for loading their cargoes and departing from such ports or places; and that such Russian Merchant Vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

(**a**.) This section gave freedom and safe conduct to all purely merchant vessels in our ports on April 26th.

It is noticeable that neither proclamation distinctly states that it is limited in its application to merchant vessels in any ports or places within the sovereign's dominions on the outbreak of war, or on the day the proclamation was promulgated, but that *only the date of the expiration of the privilege* is stated.

In the Queen's proclamation vessels were allowed "until the tenth day of May next, six weeks *from the date hereof*" (March 29th); but this privilege did not in terms extend back to the beginning of war. The existence of war was stated in another Declaration issued by the Queen on May 28th (*Appendix A*, *post*, p. 55); and it existed even earlier. It is obvious therefore that the Order of March 29th did not in terms apply to vessels which left English ports after war broke out and before March 29th, 1854.

In the President's proclamation the privilege expired on May 21st. By leaving out the words "twenty-five days from the date hereof," it has been claimed the President left open for construction the question whether he intended this privilege to take effect from the date of the proclamation, or to have it relate back to some previous date, or to leave it open so as to give exemption to any vessel which may have left a port in the United States prior to May 21st, and whether before or after April 21st.

The District Judge read into the proclamation an intention to have its privileges apply only to vessels which were actually in ports or places of the United States *on April 21st*, construing the first clause so that it should read as follows: "Spanish merchant vessels in any ports or places within the United States [on April 21st, 1899], shall be allowed till May 21st, inclusive, for loading their cargoes and departing from such ports and places," &c. By that construction he excluded the *Buena Ventura* from the exemption intended to be conferred by this section, for the reason, as he held, that she was not within a port or place of the United States on April 21st (Opinion, pp. 27, 28).

As no rights of the captors attached by force of the cap-

ture or prior to condemnation (the *Aighurth*, the *Sarah Starr*, Blatchf. Pr. Cas., 635, 637; *Stevens v. Bagwell*, 15 Vesey, 139; *Davis Int. Law*, 261; 2 *Halleck Int. Law*, Baker's Ed., 363), and as there had been no condemnation at the date of the President's proclamation, it was clearly within the *power* of the Executive to release, by the proclamation, any vessels which had been captured prior to that date, and were then in port, and within the terms of the exemption. The only question, therefore, under this section is, must this proclamation be so construed as to limit its application to vessels which were in port on April 21st, and to exclude from its benefits those vessels which were in ports or places within the United States on April 26th.

On this point "the Court," as stated by Dr. Lushington, in the *Argo* (Spinks' Pr. Cas., 52, 53), "must be governed and restricted by the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument to be construed."

Unless the contrary is stated on the face of a proclamation, it is undoubtedly the general rule that it takes effect from the date of its execution (*Lapeyre* v. *United States*, 17 Wallace, 191; *U. S.* v. *Norton*, 97 U. S., 170; *De Bow*, v. *U. S.*, 11 Ct. Cl., 676).

Wheaton, Maritime Captures and Prizes (p. 299, lays down the same rule:

"An armistice, truce or other suspension of hostilities, binds the contracting parties from the date of its conclusion."

Lapeyre v. *U. S.* appears to have been the earliest case in which the exact question was considered by this Court. A majority held that Proclamations, like Statutes, become effective from their date, but four of the Justices dissented upon the ground that, not having been publicly promulgated until three days after it was issued, effect could be given to it only from the date of its public promulgation. Upon this point the dissenting Justices (Hunt, Miller, Field and Bradley), said (p. 206):

"It has been suggested, although this proclamation did not come into existence until the 27th of June, that after

it did take effect it related back to the 24th of that month" (the date on which it was signed). "Such a principle is unknown to our laws. It involves the general effect of a retroactive law. That a man should on the 24th of June perform an act lawful and commendable; that by an official declaration on the 27th this lawful act should be rendered unlawful at the time it was performed and punishable, is in violation of every idea of constitutional law and of common right. When applied to criminal law such an act is *ex post facto*, and retroactive when applied to civil cases."

In the Court below the Government maintained that the proclamation became operative only from its date, and that construction was not opposed by the claimant in the present case; though some of the other claimants who were then before the Court contended that the words [in any port or place] "on April 21st" should be read into the proclamation (Opinion, p. 27).

If the ordinary rule of construction is to be followed, the proclamation took effect on April 26th and exempted from detention all the Spanish *merchant* vessels in ports or places of the United States on that day, *except* (1) vessels having on board contraband persons, (2) contraband goods or (3) more coal than was needed for the voyage. The *Buena Ventura* fell within none of these exceptions, and hence, by the explicit language of the proclamation, she should have been allowed to proceed to destination without molestation.

(**b**.) If, however, the proclamation be considered ambiguous, then a liberal construction of it should be adopted, having regard to the purpose and intent of the whole proclamation, its objects and aims, and designed to give effect to such objects, rather than one which reads into it a date (April 21st) which would defeat them.

Even though effect be given to it, by relation, anterior to its date (April 26th), it would not follow that the retroactive force should stop at April 21st. No date was expressly fixed for the commencement of immunity. The

omission of such date implies either that it was to have force only from its issue, or that it was to include all merchant ships in our ports, or which might have been, or might come in them, before May 21st, the date the immunity expired. The latter construction would perhaps correspond better with the root idea of notice, which underlies the proclamation.

The apparent purpose of the document was to prevent the capture and condemnation of Spanish merchant vessels which might come innocently, and by our encouragement, within our grasp, without knowledge that war had broken out, and without an opportunity, based upon such knowledge, of separating themselves fully from the conflict and avoiding the risks of capture. Thus, by the Fifth Section, Spanish vessels, which, prior to April 21st, had sailed from any foreign port bound for our ports, were exempted; and by the Fourth Section, a corresponding exemption was doubtless intended to be given to vessels in our ports, or which might have left our ports in ignorance of the war, and were still in waters where, through ignorance, they were liable to capture before an opportunity was given them to leave the theatre of war.

The *Buena Ventura* left Ship Island on the 19th of April; and her officers, at all times prior to the capture, were ignorant that war had begun, or was about to begin (Record, p. 7). It is as wrong morally, and as contrary to the principle of the proclamation, to condemn her when captured in our coast waters and bound for one of our ports, as it would have been if she had sailed from a port in Mexico; yet, in the latter case, the language of the proclamation would have undoubtedly protected her.

A liberal construction of the proclamation, in the sense in which Dr. Lushington laid down the rule, requires a construction in accordance with its spirit and intent, so that all vessels similarly situated shall have the same exemption. It is illogical and absurd to say that the *Buena Ventura* would have been exempt from condemnation, by the fourth section if she had not sailed until April 21st, but that because she sailed on the 19th she must be condemned; or that the fifth section would protect her if

she had sailed from Mexico for Norfolk on the 19th but having left Ship Island on that day she must be condemned. The Court may reject any construction which would lead to illogical or absurd results. At least such results ought not to be reached through construction, or by reading in a date not expressed.

(**c**.) But if the fourth section of the proclamation must be limited to vessels which were in ports or places of the United States on April 21st, the *Buena Ventura* was in such a place, within the meaning of the proclamation.

It appears from her log, which is on file in this Court that she sailed from Ship Island for Norfolk at 7 A. M., April 19th. At 9 A. M. she anchored outside the bar, and remained there until 5.30 P. M. of the same day, when she raised anchor and proceeded on a course S. 65° E. At 8 P. M. the log records that Chandeleur Light disappeared, distant 18 miles, and that the course was then set S. 50° E. At noon of the 20th she was in latitude 38° 12′ N. and longitude 86° 43′ W.

The distance made up to that time was 162 miles.

The true course is then stated in the log to be S. 47° E.

The entry for April 21st shows the course in the first watch was S. 47° E., with a northwesterly variation of 4° 30′; and the true course is set down for the day as S. 42° 30′ E. The distance made on this day is 203 miles. The total distance made up to noon from departure was 365 miles.

At noon of April 21st her position was in latitude 25° 53′ N., longitude 84° 10′ W.

These positions and courses, laid down on the chart (filed herewith), show the vessel to have been at that time less than 100 miles in a northwesterly direction from the light on Tortugas. If the last course which is noted in the log, South 42° 30′ E., was continued, the steamer went straight to Tortugas Light, and if she maintained, as presumably she did, the average speed previously made, that is, about 8.5 knots per hour, she would have been at Tortugas about 11 P. M. of April 21st

Whether she passed to the westward or to the eastward of Tortugas does not appear; but her evidence is that she

was proceeding on the morning of the 21st close to the reefs along the Keys, and bound eastward on the course to Norfolk. She was eight or nine miles from Sand Key Light, which is a few miles to the westward of Key West, when captured, but her distance *off* the Light does not appear. She may have been within a mile of it, and to the eastward or westward of it, as well as eight or nine miles to the southward of it; but her exact position nowhere appears other than that, as before stated, she was steering "close to the reefs."

It is obvious, therefore, that she had been within the range of our lighthouses, and was within the immediate neighborhood of Tortugas, on the night of the 21st – if, indeed, she did not pass inside of Tortugas; and hence clearly within our territorial waters, and within a place in United States on April 21st. If the decision of the case should make necessary the exact determination of this point, further proofs should be allowed (The *Venus*, 1 Wheat., 112; The *Mary*, 9 Cranch, 126, 140; The *Frances*, 8 do., 354; 9 do., 183; The *London Packet*, 2 Wheat, 372; The *Sally Magee*, 3 Wall., 451).

What is a "place," as distinguished from a "port" in the United States, has not been definitely stated, at least with regard to waters within the gulf? Our territorial rights in the Gulf waters have never been admitted to be so limited as in the waters of the ocean. The limit of our jurisdiction over the shore waters of the ocean was stated by Chief Justice Marshall, in *Church* v. *Hubbart* (2 Cranch, p. 187), to be limited only by the range of the cannon shot; and the political department of the government offered to discuss with the English government in 1864, the question whether, by reason of the improvements in gunnery, such boundary does not at present exceed one marine league (3 *Wharton, International Law Digest*, Sec. 32, p. 104).

Formerly a much greater jurisdiction was claimed over coast waters (*Reg.* v. *Keyn*, 2 Exch. Div., 63, 72, 73, 74; *Wharton Int. Law Dig.*, § 32; 1 *Kent's Com.*, star. pp. 30, 31); but it seems now to be recognized in *Wiborg* v. *United States*, 163 U. S., 632, 658, 660, that the marine

belt on the ocean over which we have jurisdiction is limited to three miles.

This, however, does not necessarily apply to the Gulf. In Mr. Bayard's letter to Mr. Manning, Secretary of the Treasury, May 28, 1886 (1 *Wharton Digest*, Sec. 32, p. 107), he pointed out that the position of the department of state that the sovereignty of the shore extends only three miles is limited to "the eastern coast of North America."

In the Gulf a more extensive sovereignty has been claimed. This is made very clear in the treaty of Guadalupe Hidalgo between the United States and Mexico, concluded February 2, 1848, in which the boundary line between the dominions of the parties is made to begin in the Gulf of Mexico *three leagues from land*, and to end at a point in the Pacific Ocean between Upper and Lower California one league from the shore. This provision of the treaty is as follows:

"The boundary line between the two Republics shall *commence in the Gulf of Mexico, three leagues from land*, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence northward, along the western line of New Mexico, until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then on the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean. * * * And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the

middle of the Rio Gila, where it unites with the Colorado, to *a point on the coast of the Pacific Ocean, distant one marine league* due south of the southernmost point of the port of San Diego."

Treaties and Conventions between the United States and other Powers (p. 683).

These boundary lines are reaffirmed in the Treaty of December 30, 1853, Art. I. (*Treaties and Conventions*, p. 694).

In 1 *J. Q. Adams' Memoirs*, 376, 377, reference is made to the claim of Mr. Jefferson that our jurisdiction should extend, for certain purposes at least, to the Gulf Stream. He writes:

"The President (Mr. Jefferson, in an informal conversation), mentioned a late act of hostility committed by a French privateer near Charleston, S. C., and said, 'We ought to assume as a principle that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed.' Mr. Gaillard observed that on a former occasion, in Mr. Jefferson's correspondence with Mr. Genet, and by an act of Congress at that period, we had assumed only to claim the usual distance of three miles from the coast; but the President replied that he had then assumed that principally because Genet by his intemperance forced us to fix on some point, and we were not then prepared to assert *the claim of jurisdiction to the extent we are in reason entitled to;* but he had taken care to reserve this subject for future consideration, with a view to this same doctrine for which he now contends."

President Jefferson expressed his views on this subject in his Fifth Annual Message, 1805, as follows:

"Since our last meeting the aspect of our foreign relations has considerably changed. Our coasts have been infested and our harbors watched by private armed vessels, some of them without commissions, others with those of legal form, but committing piratical acts beyond the

authority of their commissions. They have captured in the very entrance of our harbors, as well as on the high seas, not only the vessels of our friends coming to trade with us, but our own also. They have carried them off under pretense of legal adjudication; but not daring to approach a court of justice, they have plundered and sunk them by the way, or in obscure places where no evidence could arise against them; maltreated the crews, and abandoned them in boats in the open sea or on desert shores, without food or covering. These enormities appearing to be unreached by any control of their sovereigns, I found it necessary to equip a force *to cruise within our own seas*, to arrest all vessels of these descriptions *found hovering on our coast within the limits of the Gulf Stream, and to bring the offenders in for trial as pirates.*"

(*Messages and Papers of the Presidents, Vol. I., pp.* 383, 384.)

Though our courts may not take jurisdiction to punish offenders for crimes committed more than three miles from our shores, the government has claimed a jurisdiction over our coast waters for other purposes, and still claims it, to a distance of at least *four leagues*. The Collection Act of the United States, March 2, 1799, S. 27, provided:

"That if after the arrival of any ship or vessel, so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coast thereof, any part of the cargo of such ship or vessel shall be unladen, for any purpose whatever, from out of such ship or vessel as aforesaid, before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof, and shall be there duly authorized by the proper officer or officers of the customs to unlade the same, the master or other person having the charge or command of such ship or vessel, and the mate or other person next in command shall respectively forfeit and pay the sum of one thousand dollars for each such offense; and the goods, wares and merchandise so unladen and unshipped shall be forfeited and lost, except in the

case of some unavoidable accident, necessity or distress of weather."

R. S., § 2760, now in force, provides:

The officers of the revenue cutters shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose. They shall go on board *all vessels which arrive within the United States or within four leagues of the coast thereof*, if bound for the United States, and *search and examine the same*, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination.

Similarly, the British Hovering Act, passed in 1736 (9 George II., Cap. 35), assumes for certain revenue purposes a jurisdiction of four leagues from the coasts by prohibiting foreign goods to be transhipped within that distance without payment of duties.

In *Hudson* v. *Guestier*, 6 Cranch, 281, this Court rocognized the validity of a foreign condemnation for breach of a foreign municipal regulation, though the Court below had charged the jury that a seizure within six leagues from shore was valid, and the seizure was alleged and proved in a collateral action here to have been made on the high seas.

Chancellor *Kent*, in his *Commentaries*, considers that for fiscal and defensive regulations the United States would be justified in claiming jurisdiction over the waters between the great headlands on our coasts, including the basin from the end of Cape Florida to the mouth of the Mississippi River, which would include the whole of the waters in which the *Buena Ventura* was navigating during the whole day of April 21st (1 *Kent's Comm.* pp.*30, 31,

When the President used the word "place," as distinguished from "port," in the United States, in his procla-

mation, it is assumed that he meant any place over which our government for any purpose would exercise any kind of jurisdiction or control, and where, accordingly, we would be likely to have public vessels, which, upon the outbreak of war, would be in a position to capture Spanish merchant vessels proceeding along or through such places in ignorance of the war.

Without attempting to state accurately the limits of a "place" within the United States, in the sense of the proclamation, it seems that the waters which are lighted by the lighthouses we have placed along our coast line for the guidance of mariners, and through which the *Buena Ventura*, by our permission, was passing during the last hours of the 21st and the morning of the 22d, are such a "place," and that, accordingly, she should be exempt from condemnation, because she was within it, in the sense of the proclamation.

III.

The Coastwise Clearance granted to the steamer by the Collector of the port of Pascagoula was in legal effect a safe conduct, permission or license to the vessel to proceed to Norfolk, which, having been acted and relied upon, was not revoked by the outbreak of war, unknown to the master, during the vessel's passage, but should have protected her from capture.

The Revised Statutes of the United States, Sec. 4367, and Article 149 of the Customs Regulations of 1892, and the Circular of the Treasury Department No. 84 of 1896 (ed. 1, 19, '97, 2,500), authorize the collector of a port to grant coastwise clearances to vessels which have complied with the law.

Section 4367, R. S., provides:

"The master of every foreign vessel bound from a district in the United States to any other district within the same, shall, in all cases, previous to her departure from

such district, deliver to the collector of such district duplicate manifests of the lading on board such vessel, if there be any, or, if there be none, he shall declare that such is the case; and to the truth of such manifest or declaration he shall swear, and also obtain a *permit* from the collector, *authorizing him to proceed to the place of his destination.*"

The Customs Regulations of 1892, Art. 149, provide:

"No foreign vessel can engage in carrying merchandise nor passengers from port to port in the United States, even though the voyage may be temporarily broken by a clearance for a foreign port and arrival thereat; but she *may proceed from one domestic port to another* for the purpose of unlading her foreign cargo, or to take in cargo for a foreign voyage."

The following is the Treasury circular:

(17198.)

"Clearances of vessels proceeding foreign via a domestic port (Circular No. 84):

"TREASURY DEPARTMENT, June 5, 1896.

"To Collectors of Customs and others:

"A foreign vessel clearing from a domestic port to a foreign port *via* a domestic port, where she is to stop for coal, supplies, or cargo, should proceed under sections 4367, 4368 and 4369, Revised Statutes, delivering to the collector at the first port duplicate manifests, properly sworn to, and obtaining *permit*, as in other cases, *to be presented at the port of destination in the United States.* If imported cargo be retained on the vessel, the requirements of sections 2654, 2776 and 2777, Revised Statutes, as to bond, must be observed.

"Shippers' manifests of export should be accepted by the collector at the first port as if the vessel were to proceed from such port directly to a foreign port, and returns should be made to the Bureau of Statistics accordingly, the collector at the second port forwarding returns only of the merchandise laden at his port for export, or of merchandise laden elsewhere, covered by shipper's manifest presented at his port and not included in the returns of another collector. It is the practice for the master to file at the last port of departure for a foreign port a full manifest of the cargo (sec. 4197, Rev. Stat., Synopses, 5644, 6893). The *fee* for the *coastwise permit* is $2.

"Similar action as to returns should be taken in the case of a vessel of the United States clearing coastwise with cargo laden at one domestic port for export in her *via* another domestic port.

"Forms 483 and 504¾ (Cat. Nos.), will be amended by the Department accordingly, so that they may show whether or not, merchandise laden at a domestic port for exportation via another domestic port, will be included in the statistical returns from the first port.

W. E. CURTIS,
Acting Secretary."

Pursuant to these provisions of law the ship paid for and obtained the following pass:

"DISTRICT OF PEARL RIVER,
"PORT OF PASCAGOULA,
"14th day of April, 1898.

"J. de Luzarraga, having sworn as the law directs, to the within manifest, consisting of lumber and ship stores, articles of entry, and delivered a duplicate thereof, *permission is hereby granted to the S/S Buena Ventura to proceed to Norfolk, Va., to lade bunker coal.*

"Given under our hands at the Custom House, Pascagoula, the date and year above mentioned.

(Seal) "Deputy Collector of
"Customs, Port of Pasca- "A. E. KREBS,
"goula, District of Pearl Depy. Coll.
"River, Miss.
"Coasting Manifest, ₱1 and clearance paper."

The face of the coasting manifest, on the back of which the clearance is printed, contains this item: "Fees $2 for foreign vessel." This was the proper charge for a coastwise clearance (*ante* p. 44).

Foreign vessels are excluded from our coastwise commerce, except in the cases provided by the above regulations, and can enjoy the privileges by them conferred only upon the complying with the law and paying the statutory fees. In the present case, it appears from the manifest itself, upon which the clearance and pass are endorsed, that master did comply with the laws, and did pay the "fees $2 for foreign vessel," and thus, for a valuable consideration, secured the pass duly authorized by the Government, entitling him to proceed from Pascagoula to Norfolk.

Whilst proceeding in supposed security, under the authority thus obtained, and in the usual path of vessels bound coastwise, the ship was captured without any previous notice of the revocation of the license, brought into Key West, and has been condemned; and not even the consideration of "fees $2 for foreign vessel" has been restored or offered back.

This pass, absolute on its face, should have protected the ship until she had completed that part of her voyage which it covered. It was not a mere statement that the vessel had entered and cleared from the Custom House, such as is given by authority of R. S., §4201, to vessels bound on foreign voyages. It was a permission or license to do a specific thing for which a valuable consideration had been paid, and in reliance upon which the master had acted. In every just sense it was an executed license, which should not have been revoked, even upon notice, much less without notice (*Wood* v. *Manley*, 11 Ad. & El., 34; *Devonshire* v. *Eglin*, 14 Beav., 530; *Rerick* v. *Kern*, 14 Serg. & Rawle, 267; *Decorah Woolen Mill Co.* v. *Greer*, 49 Iowa, 490; *Buchanan* v. *Logansport Ry.*, 71 Ind., 265; *Wilson* v. *Chalfant*, 15 Ohio, 248).

To revoke the license without notice, and capture the ship at the same time, was contrary to every principle of justice and right. The breaking out of war, if war be deemed to exist on April 22d, should not operate as a revocation of this license (1 *Halleck Int. Law*, Bakers Ed., p. 542). No declaration of war was made until April 25th, and there were no actual hostilities before this capture.

A retroactive declaration of war should be held to have effect only on our public relations, and not upon questions of private right (see *post*, pp. 49–52).

Though the existence of war, when officially declared to exist, abrogated the public conventions between the United States and Spain, it should afford no excuse to our Government for refusing to allow performance of its private contract, which had been entered into with the master of a foreign ship.

War does not abrogate contracts between citizens of belligerent states; at most, it merely suspends their operation. If a citizen of the United States, whose contract with a

Spanish subject was suspended by the outbreak of war, took advantage of that circumstance to seize the enemy's private property within his reach, the criminal law would punish the offense.

The simplest considerations of justice require that the pass in this case should protect the ship. It was absolute on its face; it had encouraged the master to make the voyage; and the ship had sailed under and in reliance upon it directly into danger.

If the license had not been executed or partly executed, the vessel would not have been in the place where she was captured.

If, however, the war should be deemed to operate as a revocation of the license for which a consideration was paid, the steamer should, at least, be placed in the same or as good a position as that which she occupied when the license was granted; that is, she should have been returned to an American port and there given the same freedom that she had in Pascagoula. Assuming the captors were justified in visiting the vessel as a ship flying the enemy's flag, still, when the examination of her papers disclosed the fact that she was sailing under a pass to Norfolk, the Commander should have allowed her to proceed to Norfolk in accordance with the original permission. At most, he might have taken her into Key West for further search; but on finding no ground for detention, he should have permitted her to clear for a foreign port direct, in accordance with the proclamation.

A further reason for giving the steamer the benefit of the pass is that it is the same kind of a pass that the President, by his proclamation, gave to vessels which were bound from foreign ports to ports in the United States on the same day. Even if, under other conditions, the outbreak of war would have operated to revoke this permission, it should not in this case be held to do so, because it is the same kind of a permission which was granted by the Executive to vessels on the high seas, bound to our ports from ports in foreign countries.

The existence of provisions of law for the granting of passes from one port in the Union to another may have been the reason why vessels which had or might have

secured such passes were not included in the proclamation. If they had bought and paid for a pass and had sailed in reliance upon it, and were entitled to go to destination under it, there was no occasion for the Executive, by proclamation, to give them another pass.

IV.

The restoration of the "Buena Ventura" should be accompanied by damages for unlawful capture and condemnation.

Every marine capture is at the peril of the captors, who must show just grounds for the detention or condemnation of the ship, or be liable for damages (The *Resolution*, 2 Dall., 1; The *Grand Sachem*, 3 Dall., 333; The *Charming Betsy*, 2 Cranch, 64; *Maley* v. *Chattuck*, 3 Cranch, 458; The *Amiable Nancy*, 3 Wheat., 546; *British Consul* v. *Thompson*, Bee., 142). If, however, there was probable cause for the capture or the subsequent detention, it is proper to submit the cause for adjudication before the prize tribunal, and no damages will be recoverable though the Court should acquit without the formality of ordering further proof (The *Olinde Rodrigues*, 174 U. S., 510; The *George*, 1 Mason, 26).

The application of these principles to the present case authorizes a claim for damages upon one or more of the following grounds:

(**a**.) The capture was premature, and out of accord with recent practice.

At the time the *Buena Ventura* was seized, there had been no declaration of war, nor had any acts of violence occurred between the armed or naval forces of the different nations. No hostilities, which in International Law are deemed to constitute a beginning of war without a declaration, had taken place. Without a declaration, it seems that war

does not begin until some blow is struck or some shot fired (1 *Halleck, International Law*, Ed. of Baker, p. 525; *Owen's Declaration of War*, pp. 12, 36, 37; *Hall. Int. Law*, 4th Ed., pp. 63, 392; *Takahashi's International Law during Chino-Japanese war*, pp. 9, 39; The *Teutonia*, L. R., 4 P. C., 171, 179).

The Spanish proclamation of war, issued April 23d, recognizes the treaties between the countries as in force up to that date (*ante*, p. 9).

By his message of April 26th (*ante*, p. 11), the President recognized that the United States was not in the complete position of a belligerent, and that the then existing status was doubtful and anomalous.

Nothing was done by the United States necessarily constituting an act of war, at least until the fleet reached the Cuban shore and actually established a blockade. It was while the fleet was leaving the Key West Harbor, bound for the blockading stations, that this capture was made.

Neither the order for the blockade which was issued on the 21st, nor the proclamation which was issued on the 22d (*ante*, pp. 7, 8), was of itself an act or declaration of war. It was merely a paper blockade until made effective by the actual presence of the fleet before the places blockaded.

For the same reason the sailing of the fleet from Key West for the blockading stations was not an act of war. If the fleet had remained at the place where the capture was made, there would have been no blockade in the sense of the President's proclamation.

In order to prevent a forfeiture, the Court will regard parts of a day (*Coombs* v. *Pitt*, 2 Burr., p. 1423; *Burges* v. *Solomon*, 97 U. S., 381, 384, 385). In the part of the day when the *Buena Ventura* was seized, there was not even an existing blockade, to be cited as an act of war.

Though war may be deemed to begin by an actual collision of opposed national forces, it is contrary to good practice to commence exercising the right of capture at sea before some public declaration or notice is issued to the world.

Calvo, 4 *Droit Int.* (5th Ed.), p. 46, quotes with ap-

proval the following passage from *Hautefeuille* on this subject:

"Hautefeuille insiste particulierement sur la necessite d'une déclaration préalable et speciale dans le cas d'une guerre maritime; 'il importe en effet de prevenir les navigateurs de la cessation de l'état de paix, afin qu'ils ne quittent pas le port sans prendre les précautions necessaires pour éviter le danger, et qu'ils ne deviennent pas la proie d'un ennemi au moment ou ils pensaient rencontrer un ami.' 'Les hostilites, dit-il, commises avant la déclaration de guerre ou la notification de tout autre acte equivalent et indiquant l'époque de l'ouverture de la guerre sont, à mes yeux, des attentats contre les droits de la nation attaquée, des violations flagrantes du droit primitif. Ces violations sont d'autant plus coupables qu'elles ne peuvent s'appuyer sur aucune disposition de la loi secondaire, sur aucune coutume, sur aucun usage international. * * * Toute entreprise de cette nature est un acte de brigandage, qui devrait mettre son auteur au ban des nations, et motiver contre les coupables l'application des peines reservees aux pirates."

Reference has previously been made to the fact that though the abstract right to capture an enemy's floating property attaches immediately on the acknowledged outbreak of war, the most recent book on the subject, *Owen's Declaration of War*, London, 1889, while stating the general principle, refers to no reported case where captures have ever been made without previous notice to shipping (pp. 60, 61).

It was not in accordance with international usage to attempt to make the *Buena Ventura* hostile by firing upon her. This point was much discussed in connection with the sinking of the *Kow-Shing* at the opening of the late war between China and Japan. The *Kow-Shing* flew the British flag, but was in the transport service of the Chinese. She was fired upon by the Japanese before declaration of war. On this point Professor Westlake, in a communication to the London *Times*, August 3, 1894, said:

"But, thirdly, the Japanese could not make the *Kow-Shing* a belligerent by attacking her. In order to jus-

tify themselves against her neutral owners and the neutrals whom she carried, they must show either that war had already been commenced *de facto* between China and Japan by acts of hostility committed elsewhere, or that the Chinese fleet, of which the *Kow-Shing* formed a part, was engaged in a service the completion of which Japan could not be expected to permit. The former alternative might be satisfied either by acts of hostility committed between China and Japan in Korea, or by acts of hostility committed between Korea and Japan in the course of a line of action in which Korea was receiving the support of China.

Takahashi's International Law during the the Chino-Japanese War, pp. 9, 39.

In the end the sinking of the *Kow-Shing* was justified by proof of a prior collision between the Japanese and Chinese ships of war at an earlier hour of the same day (*Takahashi*, p. 45).

The subsequent declaration of war, by the Congress, on April 25th, which recites that war had existed from and including April 21st, should not be given retroactive effect so as to justify the capture of private property which, otherwise, would not have been subject to seizure.

It was no doubt competent for Congress to make the declaration in that form, and all questions concerning our external or public relations are governed by the enactment; but it should not be deemed intended to determine retroactively, questions of private right, or relations between the government and private persons. The legality of the conduct of the government in such matters, should be determined by the status previously existing.

On this point *Halleck's Int. Law* [by Baker], Vol. 1. page 542, says:

"Where the Government itself has fixed no positive time for the commencement of hostilities, either past or future, and where its intentions are at all doubtful, the conduct of individuals is entitled to a lenient and favorable construction. A court will not, in such cases, condemn property as involved in trade with the enemy unless fully satisfied, not only that hostilities existed, but that the fact was so public and notorious

that the knowledge of its existence was justly to be imputed to the parties by whom the acts of supposed illegality were committed or authorized. It would be plainly unjust to confiscate property, *or annul contracts*, where reasonable doubt exists, either as to the intentions of the Government *or the knowledge of the parties.*"

(**b.**) If the permission to proceed coastwise, which was granted by the Collector of Pascagoula, by authority, and which was by the master delivered to the captors, be considered as in force at the time of the ship's seizure and detention (as to which an argument has been made under Point 3, *ante* pp. 44–49), it is plain that there was no probable cause for her detention.

(**c.**) The further detention of the ship after the promulgation of the proclamation of April 26, 1898, if the ship was within the exemption granted by the 4th Section thereof, as a vessel within a port or place of the United States on that date, and not of the class of vessels in terms excluded from its effect, there was no probable cause for detaining her beyond that date, and damages should follow the wrongful continuance of the proceedings instituted for her condemnation.

Last Point.

The decree of the Court below should be reversed and an order made for further proofs, or for the restoration of the proceeds of the ship, with damages and costs.

New York, October 26, 1899.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for the Buena Ventura.

J. PARKER KIRLIN,
Advocate.

Appendix A.

I.

Declaration of Her Majesty, dated March 28, 1854, with reference to Neutrals and Letters of Marque.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an Ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

To preserve the commerce of Neutrals from all unnecessary obstruction, Her Majesty is willing for the present to waive a part of the belligerent rights appertaining to her by the Law of Nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing Neutrals from bearing the Enemy's despatches, and she must maintain the right of a belligerent to prevent Neutrals from breaking any effective blockade which may be established with an adequate force against the Enemy's forts, harbours, or coasts.

But Her Majesty will waive the right of seizing Enemy's property laden on board a neutral vessel, unless it be contraband of war.

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board Enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue Letters of Marque for the commissioning of Privateers.

Westminster, March 28, 1854.

(Holland, Manual of Naval Prize Law, p. 119.)

Appendix B.

At the Court at Buckingham Palace,
the 29th day of March, 1854.
Present,
The Queen's most Excellent Majesty in Council.

Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May, next, six weeks from date hereof, for loading their cargoes and departing from such ports or places; and that such Russian Merchant Vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the right honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

Appendix C.

FRENCH PROCLAMATION OF MARCH 27, 1854.

ART. 1er. Un delai de six semaines à partir de ce jour est accordé aux navires de commerce russes pour sortir des ports français.

En conséquence, les navires de commerce russes, qui se trouvent actuellement dans nos ports, ou ceux qui, étant sortis des ports russes antérieurement à la déclaration de guerre, entreront dans les ports français, pourront y sejourner et compléter leur chargement jusqu'au neuf mai inclusivement.

ART. 2. Ceux de ces navires qui viendraient à être capturé par les croiseurs français aprés leur sortie des ports de l'empire, seront relâchés, s'ils établissent, par leurs papiers de bord qu'ils se rendent directement à leur port de destination, et qu'ils n'ont pu encore y parvenir.

Le ministre des affaires étrangères.

DROUYN DE LHUYS.

(Pistoye et Duverdy, Des Prises Maritimes II., 467-8).

Appendix D.

RUSSIAN PROCLAMATION OF APRIL 19, 1854.

(*Avis du ministre des finances de Russie No. 4 de la Gazette du Commerce du 19 avril.*)

Prenant en considération les déclarations des gouvernements anglais et français, le gouvernement impérial dans son désir sincère d'écarte rautant que possible des particuliers les conséquences désastreuses de la guerre, a arrêté les règles suivantes:

Un delai de six semaines est accordé aux navires de commerce anglais et français qui se trouvent dans nos ports pour effectuer leur chargement et faire voile sans empêchement pour l' étranger. Dans les ports de la mer Noire, de la mer d'Azoff et de la mer Baltique ce delai sera compté a partir du 25 avril courant: et dans les ports de la mer Blanche à partir du joùr où la navigation aura été ouverte dans chacun d'eux.

Les navires de commerce anglais et français qui après être sortis de nos ports seront rencontrés en mer par nos croiseurs, même après l'expiration du delai fixé, en obtiendront la permission de continuer leur voyage du moment que l'examen de leurs papiers de bord aura prouvé que leur cargaison a été embarqué avant l'expiration de ce delai.

(Pistoye et Duverdy II, 471.)